

To the extent that the reconstructed notes below do not reasonably portray the oral comments of the individuals associated with those comments, the individual's or represented entities' written comments submitted in response to the Federal Register notice announcing this workshop shall prevail as to each person's/entity's position.

SUMMARY OF COMMENTS

OCSLA Policy Workshop

Houston, TX—April 27, 2004

Panel Members: George Triebsch, Ken Vogel, Veronica Larvie, Bob Mense

Opening Remarks: George Triebsch

Note Taker: Scott Ellis

Commentators:

Jay Costan
Producer Coalition¹

- The Minerals Management Service (MMS) should continue to view the jurisdiction granted to the Secretary of the Interior under the Outer Continental Shelf Lands Act (OCSLA) for pipeline rights-of-way in terms of the “sensible minimum” that it subscribed to when the Federal Energy Regulatory Commission (FERC) promulgated Orders 639 and 639A.
- The issuance of pipeline rights-of-way under OCSLA requires that the jurisdictional agency insure both 1.) open access and 2.) non-discriminatory access to shippers.
- Open access entails both the physical access as well as the reasonable economic access to pipelines.
 - The holding in Shell Oil v. FERC is a demonstration of lack of economic access to pipelines.
 - The MMS should adopt regulations mirroring FERC Orders 639 and 639A to ensure that shippers have reasonable economic access to pipelines. The FERC's holding in the North Padre Island spindown situation proves the necessity of those former rules.
- Non-discriminatory access means that pipelines must treat similarly situated shippers the same.
 - FERC addressed the non-discriminatory access to pipelines in Orders 639 and 639A.
 - The prohibition of non-discrimination in OCSLA is the same as a parallel prohibition contained in the Natural Gas Act (NGA).
- The MMS's approach under OCSLA should leverage the economic regulation of pipelines to prevent facility bottlenecks and to ensure a proper division of markets that will level the playing field.

¹ Devon Energy Corp., Dominion Exploration & Production, Inc., Forest Oil Corp., The Houston Exploration Co., Newfield Exploration Co., Spinnaker Exploration, and Total E & P, Inc.

- The MMS's approach to implementation of its right-of-way jurisdiction under OCSLA should follow the example provided by FERC in Orders 639 and 639A.
 - FERC found that two elements were necessary to carry out OCSLA's mandate: transparency and enforcement.
 - Transparency of pipeline information is necessary for shippers to know what is equal so that violations may be detected.
 - Without transparency, shippers have no means to bring a complaint and enforcement will not occur.
 - The means provided by FERC in Orders 639 and 639A is an appropriate mechanism to provide reasonable light-handed regulation.
 - Complaint procedures will be needed, and cases could be processed through one of the Department's agencies such as the Interior Board of Land Appeals (IBLA), Office of Hearings and Appeals (OHA).
 - The establishment of a "hotline" is a helpful compliment to the complaint process.
 - The MMS should not support an informal complaint process because it allows for delays and the ability for entities to game the system.
 - The holding in Williams v. FERC provides the confirmation of authority needed to implement the FERC-form of regulation.
- The MMS should adopt a reporting regimen similar to that employed by FERC under Orders 639 and 639A.
 - The reporting regimen should include downstream production handling services that are necessary for transportation.
 - The MMS should use FERC Orders 639 and 639A as the standard for reporting price and economic data.
 - The MMS should require updates to data on a quarterly basis.
 - The MMS should not adopt FERC's confidentiality standard for price and economic data.
 - The MMS should adopt a penalty provision for pipeline operators failing to report.

- Exemptions from reporting requirements should be allowed for NGA pipelines, for oil pipelines regulated by the Interstate Commerce Commission (ICC), and for feeder lines (as already defined by FERC).
 - OCSLA does not require a showing of need for MMS to implement something similar to the above-described regime of reporting requirements.
 - By implementing a form of the reporting requirements described above, it will not be necessary for shippers or others to compile an evidentiary record.
 - Specific instances of discrimination have already occurred invoking the need to provide the oversight mandated by OCSLA.
- The MMS should consider transportation as including post-production facilities since the same types of discrimination may occur there as on pipelines.

The commentator then responded to the panel's following questions:

- How extensive is the problem (Is the North Padre Island situation the exception?)? What resources are necessary to implement a program?
 - Due to the lack of transparency, sufficient information is not available to determine the extent of the problem. It is a “catch 22” situation. The North Padre Island situation was simply unconscionable, which made it an obvious violation.
 - As producers move into deeper water, there is a concern that there will not be adequate protection from monopolistic carriers.
 - The statute allows for a reasonable amount of discrimination.
 - A program that does not actively monitor submitted data will not have to be manpower intensive, but shippers must be able to access the information.
- What is the reason for feeder line exemptions?
 - One reason is that feeder lines represent insignificant facilities.
 - Rather than advocate this exemption, it is only presented as a possibility. The MMS should examine FERC 's rationale for implementing its program so MMS can benefit from FERC's experience.
 - Our concern lies mainly with deep-water production situations.
- How does the statute allow any discrimination?

- One view is that it does not allow any discrimination.
- If one examines how the courts view the administration of other statutes, a rational basis is used to provide selective discounting under certain circumstances.
- In order to keep some pipelines operating, reduced rates may be allowed.

Jody Cartwright
Vision Resources / Walter Oil & Gas

- There is a need to establish specific guidelines for pipeline transportation of oil.
- Because of the absence of guidance, some qualities of crude oil may be excluded from transport on some pipelines.
- Who do the pipelines need to serve, the producers or the market?
- Access to some pipelines is restricted due to oil quality. Not all pipelines are required to institute quality banks.
- There is a need for a system to treat shippers equitably.
- Guidance is especially needed for proprietary pipelines.
- Without a rate increase guide, the arbitrary establishment of rates-of-return on aging pipelines leads to unfair and inequitable treatment.
- Transparency is needed because neither is there an obligation for pipelines to communicate nor is there any form of oversight.

The commentator then responded to the panel's following questions:

- Can you define discrimination on the basis of oil quality?
 - Discrimination occurs when pipelines refuse to ship production because the oil quality does not meet the standards set by the pipeline for other shippers presently using the facility.
 - For pipelines that do not use quality banks, the access to that pipeline for shippers of crude oil that is a different quality from that which is being shipped is usually dependent on whether it is beneficial for the pipeline to do so.
- Is this a problem with deregulated pipelines only?

- No.
- Is instituting a quality bank the only means of resolving this issue?
 - An alternative is to batch similar quality crudes, but this requires large volumes.

Thomas Eastment
Indicated Producers²

- The MMS should not establish a regulatory regime that exceeds statutory authority, but one that creates a balance without imposing excessive burdens.
- The statutory authority expressly covers pipeline transportation services and not producer's activities. The statute never contemplated producer regulation.
- The MMS needs to make a distinction between pipeline services and producer's activities both from an authority perspective and from a policy perspective.
 - The activities and agreements entered into by producers are highly complex and represent much more than just a transportation rate.
 - Do not regulate producer activities associated with production conditioning and processing.
 - A regulatory regime similar to FERC Order 639 would be over-the-top for producers because of the massive burden created for producers and for the administrator agency.
 - Burdening producers' facilities with common carrier requirements would discourage investment and destroy the 50-year history of commercial offshore leasing alchemy.
- The regulatory regime should be a complaint-based mechanism that provides the necessary information post-complaint.
 - There is no need to create a detailed reporting system.
 - A pipeline spindown does not justify an expansion of authority into producer activities.
 - A complaint-based mechanism aptly delineates producers' responsibilities although some terminology, e.g., gathering, is cause for confusion and needed clarification.
 - The MMS need not duplicate the pervasive regime that FERC administers under the NGA, and that necessarily includes some oversight of certain gathering lines.

² British Petroleum, ChevronTexaco, Exxon Mobil, and Shell Offshore.

- FERC has the ability to assert its jurisdiction over pipelines “in connection with” interstate lines.
- The MMS must limit its oversight substantively.
- The MMS’s jurisdiction must properly focus on gas without getting into Interstate Commerce Act (ICA) jurisdiction.
- The number of issues and complaints for MMS to deal with is limited.
- The MMS should provide for a “hotline” as an initial stage. Formal proceedings will only be occasionally needed.
- The MMS’s guide for formal proceedings may be either the IBLA-type of process with discovery or the FERC-type of process with discovery.

The commentator then responded to the panel’s following questions:

- How extensive is the problem with open and non-discriminatory pipeline access?
 - There is not a problem with producers. In the previous regime, FERC lost its way when it allowed pipelines to spin-off facilities to affiliates. Affiliates were able to charge rates that the markets would bear in lieu of oversight, but old facilities should have been limited.
- How will we know if providing more information is driving complaints?
 - Publicizing all data would be counter-productive. Producers know when they are being wronged by excessive rates. Depositions and hearings provide a sufficient basis to remedy violations of OCSLA. There needs to be a balance between the likely number of violations and a pervasive regulatory regime. A complaint-based approach serves that need.

Jay Costan - reprise
Producer Coalition

- There are differences of opinion regarding the jurisdictional authority of section 5(f)(1)(a). That authority must be jealously guarded rather than mirror FERC’s approach, which failed to guard it enough.
 - The current [FERC] definition of gathering is too broad. Transportation starts at the wellhead and includes all activities downstream as part of a continuous chain.

- Feeder lines, from the wellhead to a facility performing separation, dehydration, and or processing, may be exempted. Part of the district court debate [Williams v. FERC] concerned the statutory interpretation of whether Congress meant to adopt a wellhead to shore definition of transportation and then to exempt certain parts, such as feeder lines. The other view is whether transportation starts after production is conditioned.
- Any means MMS uses to assert jurisdiction other than a FERC-style reporting mechanism will not work.
- The statute's open access requirement is separate from the non-discrimination requirement.
- The complaint procedure is not a panacea. The costs involved with this mechanism may be prohibitive (Intervenors' expenses in Shell Oil were in excess of \$100k).
- As the administrator of rights-of-way under OCSLA and as administrator of the Royalty-in-kind (RIK) program, MMS is not disqualified as an adjudicator of right-of-way issues.
- Other agencies in the Federal government have successfully served in similar types of opposing administrative and enforcement capacities.

William McCarson
J. Conner Consulting

- How will any regulatory scheme be affected in the event of an emergency situation, e.g., could a national security issue preclude the regulatory scheme? Or, in the case of a pipeline rupture and shut-in of production from multiple shippers, how could the leases be returned to production without discrimination?
- Other exemptions to OCSLA jurisdiction include pipelines exclusive to liquefied natural gas (LNG).
- The Marine Transportation Safety Act (MTSA) excludes LNG pipelines from common carrier status.
 - Would gathering lines be exempt from jurisdiction? Floating Production Storage and Offloading facilities (FPSO's)? Feeder lines?
 - Would the jurisdiction apply only to those exempted lines/facilities already installed in the Gulf of Mexico? What about future needs?
- What information on jurisdictional pipelines does MMS already have access?
 - Do not duplicate reporting requirements already in existence.

- A uniform set of guidelines for reporting requirements will simplify accounting.
- Make the data for the regulatory scheme efficient, understandable, and obtainable.
- Even though MMS is an RIK shipper, that does not preclude it from policing itself.
 - The Coast Guard performs opposing administrative and enforcement duties.
 - The Department of Justice (DOJ) is another example.

Dawn Carpenter
Total E & P USA, Inc.

- Transportation should include production facilities.
- A system utilizing an open-records scheme would be preferred.
- A benefit from a transparent reporting regime includes having economic data at the time the business decision is made, earlier than at the discovery stage of a complaint process.
- Solely using a complaint process is not preferred because the lack of information reduces the basis for the identification of a complaint to merely a “gut instinct.”
 - Many complaints are probably not filed because of the burdens associated with a complaint process.
 - Another burden is economics, even when benefits outweigh the burden.

The commentator then responded to the panel’s following question:

- How extensive is the problem?
 - No one really knows due to the lack of available information. The industry is in need of disclosure.

Jeff Holligan
British Petroleum

- The extent of the problem is very minimal from BP’s experience [as a production facility operator/owner].

- The complex agreements for production-related facilities do not break-down the performance of each stage of conditioning/processing into separate rates. There simply is no rate basis for self use.
 - The agreements are usually based on the percentage-of-use of the facilities by owners.
 - The rates established for third-party agreements are marginal rates based on incremental costs.
 - If production-related facilities are included under OCSLA jurisdiction, one problem with production facility agreements for third parties is that all costs would have to be capitalized. That would require a full rate case, which is not currently done. The associated burden on production facility operators/owners would be enormous. Further, there has never been a complaint between third parties and production facility operators/owners.
 - Another problem is the disparity between services offered between interstate pipelines and production facilities. Interstate pipelines are unregulated monopolies where no competition exists for that service.

The commentator then responded to the panel's following questions:

- When a production facility with excess capacity accepts production from other fields, do operators commonly separate processing and pipeline costs when accounting for the outside production?
 - FERC was misguided when it unbundled transportation downstream of production facilities. Competition simply does not exist because there are no redundant facilities. Thus, a natural monopoly exists.
 - What we need are rules that maximize production over time . . . not a present value maximization, because once cost-effective production is gone so is the platform and the ability to produce.
- How would you distinguish between pipelines subject to OCSLA and the pipelines serving production facilities?
 - The pipelines that FERC is not regulating downstream of production facilities are subject to OCSLA.